



No: 86-945 (2)

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

WKRG-TV, INC.  
Appellant,

\*  
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vs.  
86-945

\* CASE NUMBER

DAN WILEY,  
Appellee.

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RESPONSE OF APPELLEE

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GREGORY M. FRIEDLANDER  
Post Office Box 8548  
Mobile, Alabama 36608  
(205) 460-0303  
Attorney for Appellee

37122



### QUESTION PRESENTED FOR REVIEW

Does the Constitution of the United States of America confer an absolute privilege on a local television station to broadcast defamatory material without regard to the truth of the material, intent or knowledge of the station.

This question is substantially different than that stated in the Petition for Writ of Certiorari. The major difference is the issue of whether or not the report was "fair and accurate". The Supreme Court of Alabama stated that this was an unresolved question of fact; page 8(a) of the Petition for Writ of Certiorari: "If Wiley can prove that WKRG thus falsified the report, he would not only show the actual malice required by Sullivan but also defeat the claimed privilege." The Supreme Court of Alabama found from the record: "Thus there is some factual dispute as to the accuracy of the report on the alleged accusation". Page 9(a) of the appendix.

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GREGORY M. FRIEDLANDER  
Post Office Box 8548  
Mobile, Alabama 36608  
(205) 460-0303  
Attorney for Appellee

### STATEMENT OF JURISDICTION

The Supreme Court should not exercise jurisdiction in this case as Petitioner has not propounded a question of Federal Law which has not been but should be, settled by this Court; nor has Petitioner presented to the Court a Federal Question.



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STATEMENT OF THE CASE

A. PROCEEDUREAL HISTORY

Dan Wiley, Respondent respectfully submits to this Court that the procedural history given by petitioner is incorrect.

Respondent, Dan Wiley sued WKRG-TV, INC., Petitioner herein, based on a broadcast by WKRG-TV, INC.. The source of the content of this broadcast is unknown, although the evidence indicates that the slander, or portions thereof, originated with the Petitioner, not Cecil Crow.

The Honorable Braxton L. Kittrell, Jr, trial judge, denied the motion for summary judgement filed by the Petitioner based on the law and facts of this case.

The Supreme Court of Alabama granted certiorari to review the interlocutory order of the trial judge and, after reviewing the facts affirmed that order denying summary judgement. The opinion of the Supreme Court of Alabama is before this court as Appendix C to Petitioner's brief and speaks for itself concerning the constitutional privilege better than the rendition given by Petitioner or Respondent.

Respondent is unable to determine what portions of the Supreme Court of Alabama opinion are referred to in the Petition for Writ of Certiorari pages 8 through 10.

The most narrow interpretation of the Alabama ruling may be summarized as: where statements are manufactured by a news service, and the said statements are false or misleading, and said statements are made in bad faith and with "actual malice", there is no constitutional First Amendment privilege. The findings necessary to support a slander case in these circumstances are a question for the trier of fact. "Given the record before us, we cannot say that Wiley would be unable to sustain a libel action, including proof of Sullivan actual malice by clear and convincing evidence." WKRG-TV, INC., v. DAN WILEY, Page 10(a) Appendix C to the Petition for Writ of Certiorari.

Where a party makes a communication which is otherwise privileged, that privilege does not extend to a statement which is not made in good faith and with "actual malice". WKRG-TV, INC., v. DAN WILEY, Page 10(a), Appendix C to the Petition for Writ of Certiorari, citing Browning v. Birmingham News, 348 So. 2d 455 at 458 (Ala. 1977).

Neither WKRG nor anyone else has a constitutional right to repeat false statements "simply because they were

made at a public meeting on a matter of public concern." WKRG-TV, INC., v. DAN WILEY, Page 6(a), Appendix C to the Petition for Writ of Certiorari.

B. STATEMENT OF FACTS:

Respondent, Wiley, would respectfully submit that the statement of the facts made by the attorney of record for the Petitioner, WKRG-TV, Inc. is largely misleading. In order to allow this Court to properly review the facts, the larger of the alleged misleading portions in the Petition for Writ of Certiorari are enumerated below and a full statement of the facts follows:

1. The most glaring misstatement is that WKRG-TV, INC. gave a fair and accurate report of what was said at a public meeting. This is contrary to the evidence which shows that the broadcast was false and a product of WKRG-TV, INC., not the public meeting.

2. Petitioner states that Cecil Crow and Linda Young seem to be in charge of the meeting on page 3-4 of the Petition for a writ of Certiorari. Apparently, this election of Cecil Crow and Linda Young was made by either WKRG or counsel of record for the Petitioner.

3. Portions of the statements made by the TV Station are added in a foot

note on page 5 as opposed to being portrayed in the content in which they were broadcast.

4. On page 6 of the Petition for Writ of Cartiorari the Petitioner states that the news reports summarized the extemporaneous statements of many speakers, including charges made by Cecil Crow. This statement concerns extemporaneous statements allegedly made by Cecil Crow. Crow has denied making these statements.

4. The Petitioner seems to have taken the fact that certain members of the crowd cheered and applauded portions of a speech made by Mr. Crow as equivalent to the entire crowd making an allegation that Dan Wiley was involved with landfill kickback scheme. (Page 6).

5. Petitioner seeks to inflame this Court by showing that there is a completely unrelated scandal concerning landfills which does not involve Dan Wiley in any way. The truth defence for slander exists in Alabama and WKRK is unable to avail itself of that defence. (page 3)

#### C: DETAILED STATEMENT OF THE FACTS

The Plaintiff/Appellee/Respondent is Dan Wiley. At the time of the alleged libel, Dan Wiley was the President of the Mobile County Commission.

WKRQ is a local broadcasting station carrying CBS broadcasting in the Mobile, Alabama area. WKRQ broadcasted the alleged libel and is the Defendant/Appellant/Petitioner herein. Mark King is a reporter who worked exclusively for WKRQ during the alleged libel.

Cecil Crow is an avid political supporter of one of the two major political parties. Dan Wiley is a member of the other major political party. Despite Crow's own denial, the libel is attributed in large part to Cecil Crow. (T-366)

Barbara Scheucher uses the stage name Barbara Shaw. Barbara Shaw is a reporter for WKRQ. On March 14, 1985, after investigation of a rumor sheet alleging similar facts to the alleged libel, Ms. Shaw declined to include the libel in her story. (T-576, 578, 580, 581).

Patrick Miller was a photographer at the location of the alleged libel and was working for WKRQ.

The libel occurred on March 25, 1983. WKRQ, TV, INC., Defendant/Appellant/Petitioner has investigated this matter since March 14, 1985 without finding any proof of the facts alleged in the libel. (T 576-577) The original source of the libel is apparently an anonymous "rumor sheet" and this origin was known to the Defendants. (T-576)

The facts of this case would support one of four conclusions, any one of which would be sufficient to hold the Defendants guilty of libel.

(1) The statements made at the meeting were not the statements which were broadcast. (2) The statements made at the meeting were not made by the parties to whom they were attributed. (3) The statements made at the meeting were known to be false or were believed false due to investigation and the investigation was not made known to the public in the broadcast nor the scope of the investigation. (4) The statements reported to have been made at the meeting were engineered or staged in part or in total by the Defendant. (T-694)

The entire alleged libel in this case is set forth in the deposition transcript, pages 552, 553 and 554 and this statement is set forth in full below.

"Good Evening...Do you want a landfill in your neighborhood? Well...neither do some homeowners in west Mobile! And they make a serious charge! According to this group...the County Commission 'fixed' plans for two landfills...because Commission President Dan Wiley would profit! Mark King was at a citizen's meeting tonight! Let's learn about it from him. Mark!

"Curt...about one hundred citizens from west Mobile turned out for the meeting at the Orchard Baptist Church. They came to map strategy for their fight. These people are upset because the A.J.B. Corporation has asked for permits to operate private sanitary landfills on two locations in Howells Mill Road-Schillinger Road area. They say the two sites would be suitable for landfills...because they're a part of the water shed for Hamilton Creek which eventually leads into the City of Mobile's water supply.

"...None-the-less, they believe the county has plans to grant permits for the private landfills and then contract with the A.J.B. Corporation, to use the landfills for the counties trash.

"...They claim a recent announcement that the county landfill near Irvington would have to be closed soon as a part of this plan.

"...And they say public officials would profit from the deal...

"The rumor says that Dan Wiley and Bay Haas are part owners of this corporation... and I think that when we go down there Monday, that we're entitled to know if there's anybody down there working both sides of the street.

"...I mean, is he part owner of a corporation that's trying to do business with the County,...If he is, we need to



know it...If he isn't, we need to know it...

"...I contacted both Commissioner Wiley and Mr. Haas at their homes tonight.

"...Wiley says the rumors are ridiculous and he says he doesn't know what the A.J.B. Corporation is. Haas says the charges are totally untrue.

"...Anyway, the citizens plan to turn out in large numbers for the County Commission Meeting on Monday morning, they've also hired a geologist to double check soil tests the state has run on two sites. Curt." (T-552-554)

In the instant case, evidence exists that the slander which purportedly took place at a public meeting was engineered in part by the television reporter who worked for WKRG. Excerpts from their transcript pages T-710-715, shown below, exemplify this.

#### Deposition of Mark King

A. "...I reported what was said at a public meeting and Mr. Crow mentioned Mr. Wiley and Mr. Haas most prominently. I called Mr. Wiley and Mr. Haas at home and got their reaction and I gave their reaction.

Q. " Well, you didn't just report on the public meeting. You reported on



what Mr. Wiley and Mr. Haas told you. They weren't at the meeting, were they?

A. "No, but I reported on their reaction on what was said about them at a public meeting.

Q. "You knew before this story that Mr. Payne had told your station that Dan Wiley didn't own any interest in his corporation; you knew that, didn't you?

A. "I knew that, yes."

Q. "Well, Mr. Fonger also reported that according to the group the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit; didn't Mr. Fonger report that?

A. "If it says here in the script that -- in the transcript that he did, I suppose he did, yes.

Q. "Now, who said that at the meeting?

A. "Mr. Crow used the word 'fix,' the fix is in.

Q. "I ask you who said 'the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit?'

A. "I don't know if anyone said that verbatim or not. We take stories -- when we do a story, we take what was said and put it in a -- we don't --

everything that's in one of our stories isn't word for word, something that someone said at a meeting. It would be impossible.

Q. "Who at the meeting said 'public officials would profit from this deal'?"

A. "Mr. Crow said things to that effect, if not that particular statement. I can't remember whether or not he made that particular statement or not.

..."He certainly made statements that were -- you know, that he, -- I believe I do remember, and of course it has been a long time ago, but I believe I remember him saying that somebody on the County Commission would profit.

Q. "No, but when he makes critical statements such as you have described, or potentially sensitive statements, you want to write those down, wouldn't you?"

A. "As much of them as I could. And, I can -- you know, a lot of times when I cover something like that, I can only write down a few words or a few portions of that statement.

A. "The request of the retraction, I believe the first time I would have heard about that would have been on Wednesday of the following week."

Although the libelous statements allegedly were made by a particular person, Cecil Crow, the Defendant did not know anything concerning Cecil Crow nor his reputation for truth and veracity. (T-673-674)

Nothing issued from the crowds which would show that the entire crowd made any charge whatsoever.

Deposition of Patrick Miller, T-127, 128:

A. "Well, you can talk about an issue without ever really being clear on your stand, and there were a number of people there who were highly emotional and yet really weren't clear on what they had to say, or at least that was my judgment and it was Mark's judgment as well. We were waiting until we had someone who was fairly knowledgeable on the subject who could state themselves in a rather concise manner."

The "group" to whom the allegations are attributed is a single speaker, now known to be Cecil Crow. Mr Crow is not a leader of the group that had met. Mr. Crow himself has denied making the statements (T-366). In Patrick Miller's deposition, (T-128) Mr. Miller states as follows:

Q: "Who was the leader of the group

If there was one? Did they have a president or...?

A. "There were several people seated at a table in front of the group. I don't remember their names offhand.

Q. "Was the man that you ultimately interviewed one of those people?

A. "He seemed to have some contact with the people along the front table but he was not seated at the table. He was off to the side.

T-671 Deposition of Mark King

Q. "All right, sir. Now, who was it that said public officials were going to profit from the deal? Who is 'they'?

A. "Cecil Crow stated it, the large crowd that was there applauded, cheered and made it clear that they supported what he was saying.

Q. "If Cecil Crow had stood up and said that Dan Wiley has murdered his grandmother, and everybody applauded, would you have reported that?

A. "I don't know."

See also (T-712,713) set forth above.

(T-697,698)

Q. "Well, why is it you didn't film the statements made by Mrs. Crow or Mrs.

Young and put them on the air?

A. "They were more or less background statements.

Q. "They weren't spicy enough for you?

A. "I don't think that's a good word. I don't think "spicy" is what I'm looking for. They were background statements. They were explaining why they were gathered there.

Q. "Well, isn't that the reason you were there to show why they were gathered there?

A. "Why they were gathered there and what was going on."

Several facts show that WKRG had a part in orchestrating the libel reported.

T-129, 131 Deposition of Patrick Miller

A. "We were -- had our equipment down when he stood up and spoke and he made the statement that there was a fix on downtown, that the efforts of the group to stop the landfill development were in vain, and Mark indicated that this was the type of information that he wanted, what he felt like reflected the view of the group as a whole.

Q. "Now, after the meeting ended,

Mark interviewed a couple of people before he got to Mr. Crow, is that what I understand?

A. "No. Actually what happened was Mr. Crow stood up again -- Mark had spoken with Mr. Crow during the course of the meeting. Mr. Crow stood up again after Mark finished talking with him and I prepared for what I first thought was going to be a one-on-one interview. Actually Mr. Crow stood before the group and basically restated what he had said earlier and that was that...."

The following statements also support the allegation that the matter was staged by the television station. (T-693-694)

Deposition of Mark King

Q. "Did you ever, at any time, go to Mr. Crow and ask him to stand up and make a statement?

A. "No, I did not ask him to stand up and make a statement.

....I went to Mr. Crow after the first time he stood up and I introduced myself, told him who I was with, I asked him for a brief interview after the meeting was over and he said fine. I also said, if you're going to be up there again, would you mind repeating what you said the first time? He said that he would not mind.

"....I didn't ask him to stand up. I said if you going to be up there anyway, if you plan on getting up again.

Q. "Why in the world would he plan on getting up again and saying the same thing he had already said?"

A. "Because it was a spontaneous meeting. It was a thing where he didn't -- when he got up there the first time, it wasn't something that was planned. He just kind of walked up from outside of the crowd and started saying things."

It was the policy of the Defendant that first "WKRG must broadcast only verifiable, accurate, privately based news." (T-217). Second, "the reporter should handle with the utmost care and caution any story which tends to injure a person's reputation." (T-228). Third, "[T]he best safeguard against a libel suit is to make certain, before broadcast, that any potential libelous statement is true and even more importantly, can be proved to be true." (T-229). Fourth, "one of the most common misconceptions about libel law is that a station can avoid liability for a false statement so long as it merely repeats or attributes the statement to a particular person. This simply is not the general state of the law." (T-230).

It should be noted for purposes of this appeal, that not only is it alleged that the statements were not made, but



that even in the event that they were made, the statements were not attributed properly. The fact that the origin of the statements was an "anonymous rumor sheet" was never broadcast.

Fifth, it is also WKRG's policy to "[A]void slipshod and indifferent or careless reporting. Whenever a statement could injure someone's reputation, treat it like fire." (T-236). Sixth, it is also the policy that "[T]he fact that a person is quoted accurately is not in itself a defense for a subsequent libel action if the quoted statement contains false information about someone." (T-237).

The Defendant's employee, Kurt Fonger, has stated that he had an obligation to do more than simply read what was handed to him. (T-239). In this case, it is fairly obvious that that responsibility was not fulfilled. In the deposition of Dan Wiley, Mr. Wiley states that he requested that the station contact Barbara Shaw prior to airing this particular news story due to her superior knowledge of the news story and there is evidence in the record which suggests that the Defendant refused to take even this step of consulting with its own investigative reporter before airing the story. (T-501).



## ARGUMENT

### SUMMARY OF THE ARGUMENT

Two conflicting needs must to be considered in this type of litigation. First is the need for the press to operate with as little interference as possible and to be able to report events to the public as they transpire in order to keep the public fully informed. The second need is the interest which individuals have to be free from defamation and the ruinous effect which can result from an unrestrained and powerful media.

As applied to the facts of this case, the issue could be phrased as whether the public benefits more from having a press free to distort events and report events in an inaccurate and unfair manner than the public's need to judge their public officials free from unfair and inaccurate investigative reporting, as well as the public officials' right to protect his reputation and to be compensated for damage done to his reputation.

The effect of the actions of the Defendant/Appellee was such as to injure not only Mr. Wiley, the Plaintiff/Respondent, but to also injure the public by depriving them of the

ability to judge their political officers for past purposes, present purposes and future elections in a fair and accurate manner. The applicable Alabama code sections are 6-5-180, et seq. (1975).

1. Alabama law does not recognize any absolute privilege for communications made by the news media where the publication was made by a Defendant who either knew the publication was false or acted with reckless disregard as to the truth or falsity of the statement.

The examination of these issues requires a look into the state of mind of the Defendant and into the editorial processes of the defamed. "Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination". Hurbert v. Lando, 441 U.S. 153, 160, 99 S.Ct. 1635, (1979). "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the Defendant and necessary to defeat the conditional privilege or enhance damages. The rules are applicable to the press and to other Defendants alike...." Id., 441 U.S. at 165, 60 L. Ed. 2d at 127.

The Supreme Court of Alabama, as recently as May 21, 1980, concerning facts similar to the facts presented in

the instant case, has held that (1) "broadcasting of defamatory matter by means of radio or television is libel whether or not it is read from a manuscript". Gray v. WALA-TV, 384 So. 2d 1062, 1065 (Ala. 1980). (2) That matter which imputes to the Plaintiff that they are engaged in conduct which is corrupt and illegal is slander actionable per se under the laws of the State of Alabama. Id. at 1065. (3) The words in order to determine their actionable character should be "construed and determined by their nature and probable effect upon the mind of the average television viewer. Bright v. Birmingham Post Co., 33 Ala. 547, 172 So. 2d 649 (1937)" Id. at 1065.

In determining whether summary judgment is appropriate in a defamation case, the Scintilla Rule is applicable in determining whether a material issue of fact exists. Alabama Rules of Civil Procedure, Rule 56, American Benefit Life Insurance Co. v. McIntyre, 375 So. 2d 239, 249 (1979) Further, the burden is on the movant in a summary judgment case involving libel grounded upon state law. Id. at 249.

"The only absolute privilege communications under Alabama Law are those made during legislative or judicial proceedings, or contained in legislative acts made under authority of law. Browning v. Birmingham News, 348 So. 2d 455, 458 (Ala. 1977)." Mead Corporation v. R. D. Hicks, 448 So. 2d

308 (Ala. 1983). The Supreme Court of Alabama promulgated a test for determining whether any other privilege exists in Fulton v. Advertiser Company, 388 So. 2d 533, 537 (Ala. 1980). Additionally, a test is required by the constitutional safeguards regarding First Amendment as enunciated in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) and as clarified in Gertz v. Welsh, 418 U.S. 323, 94 S.Ct. 2997 (1974).

The Constitutional standards require that to recover from a falsehood relating to official conduct, a public official is at least required to prove "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, supra; Gertz, supra.

Constitutional safeguards of the party pursuant to the standards set forth by New York Times v. Sullivan, supra require that the publication "must have been made with a knowledge of its falsity or with a reckless disregard as to whether it was false or not." Id. at 1066. The Court has embraced the elaborations set forth in the Supreme Court case of St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, (1968) which holds that "reckless disregard requires: sufficient evidence to permit the conclusion that the Defendant in fact

entertained serious doubt as to the truth of the publication. 88 S. Ct. at 1325". Gray, M supra, at 1066. In the present case, there was an ongoing investigation which failed to show any of the facts existed as set forth. The facts show a scintilla of evidence that the information was published with knowledge of its falsity or with reckless disregard of its truth or falsity.

The Fulton standard set forth for determining whether or not a privilege exists is as follows:

"Where a party makes a communication, and such a communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice... the duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social and moral in its nature and Defendant, in good faith, believes he is acting in pursuance thereof, although in fact he is mistaken." Fulton, supra at 537.

Presuming for the moment that the test for existence of privilege is as set forth in Fulton, supra, several requirements must be met for privilege.

(1) The statement must be made with actual malice. Actual malice is described under the Constitutional standards set forth above, and (2) the privilege must be made in good faith. (3) There must be an obligation prompted by duty.

Good faith would not be found where: (1) The statements made at the meeting were not the statements which were broadcast; or (2) The statements made at the meeting were not made by the parties to whom they were attributed. or (3) the statements made at the meeting were known to be false or were believed false due to investigation and the investigation was not made known to the public in the broadcast nor the scope of the investigation; or (4) The statements reported to have been made at the meeting were engineered or staged in part or in total by the Defendant. As each of these conditions are possible from the facts and the Scintilla Rule, summary judgment is inappropriate under the Fulton standards. Good faith is discussed in more detail under the discussion of Section 611 of the Restatement of Torts below.

The existence of a duty and an obligation to slander does not exist in any state.

In viewing the facts in a light most favorable to the Plaintiff, there is an issue as to whether the Defendant entertained serious doubts as to the

truth of the statements made. Summary Judgment is therefore inappropriate. "Whether the Defendant entertained serious doubts as to the truth of these broadcasts is a question peculiarly suited for a jury determination. American Benefit Life Insurance Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979); Loveless v. Graddick, 295 Ala. 142, 325 So. 2d 137 (1975)." Gray v. WALA-TV, 384 So. 2d 1062, 1066. (Ala. 1980).

II. Application of Section 611 would not defeat Plaintiff's cause of action for libel.

The Petitioner/Appellant before the Alabama Supreme Court alleged that the only material issue for determination of this case is whether or not Section 611 of the Restatement (Second) of Torts applies and took certain other facts as presumed in its favor. This requires a more detailed analysis of the facts in this case and the issues presented by Section 611 of the Restatement (Second) of Torts be made.

Section 611 would propose to set forth the standards for determining good faith in the event that the duty was presumed 'to report what happens at a public meeting by a television broadcasting station.' Section 611 does not give the reporter a free hand to slander under the cloak of an existing public meeting. Instead, it puts a



fairly strong burden on the Defendant, the report of events that occur at a meeting must be accurate. "[I]t is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it...." Restatement (Second) of Torts, "Defamation: Defenses" Chapter 25 at 300 Sec. 611. "The reporter is not privileged under this section to make additions of his own that would convey a defamatory impression in order to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties." (Id. at 300-301).

Upon a deviation from the events as they actually occurred, the burden shifts to the Defendant to show that the deviation is not substantial and not unduly suggestive.

Patrick Miller who was present at the meeting saw the Defendant could not clearly understand what was being said by the people present so as to attribute the alleged statement to the meeting or group. (T-128)

"Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceedings." Restatement (second) of Torts, Sec. 611 Defamation: Defenses Chapter 25 at 298. If



knowledge of the falsity of a statement is not published or if information which would negate the truth of the statement is not published, then the statement cannot be fair nor accurate.

In the present case, ample evidence exists that the Defendants did, in fact, investigate the truth of this matter and that pursuant to the investigation, one of the employees of the Defendant, Barbara Shaw, made contact with one of the parties and two (2) attorneys, (T-576, 577), all of whom denied the statements (T-578) and offered various ways to substantiate their position that the statements made in the broadcast were false (T-350) in a conversation with Barbara Shaw on March 14, 1983 (T-578), (T-355-358).

There was absolutely nothing published concerning this investigation in the broadcast of March 25, 1983, made by the Defendant, nor did they give their failure to investigate or any of the other evidence concerning the origin of the rumors presented which would tend to show the lack of veracity of those rumors. None of those contacted prior to the libel substantiated the rumor that Dan Wiley was involved with A.J.B. Corp. (T-585) Mark King was made aware of these facts and the concern over the broadcast and potential lawsuit and chose to ignore these facts. (T-591)

There is a substantial question as to the truth of the matters asserted in the report and Mr. Crow has denied accusing anybody of anything (T-366) and according to the actual transcript of the broadcast, statements were made that things were said and charged by a group when there is no proof that any of these statements were made nor that they were proved by any group in the event that they were said (T-552-554). Further, nothing was made in the report of the fact that the Defendant had made an investigation and found absolutely no basis for libel contained in their report. In the present case, not only are the statements questioned and the manner in which they are supposed to have been ratified by the meeting or group in question, but the existence of these statements having been made at all other than in the broadcast by WKRK, the Defendant, is questioned.

#### Deposition of Mark King

Q. "Well, Mr. Fonger also reported that according to the group the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit; didn't Mr. Fonger report that?

A. "If it says here in the script that -- in the transcript that he did, I suppose he did, yes.

Q. "Now, who said that at the meeting?

A. "Mr. Crow used the word 'fix,' the fix is in.

Q. "I ask you who said 'the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit.'

A. "I don't know if anyone said that verbatim or not. We take stories -- when we do a story, we take what was said and put it in a -- we don't -- everything that's in one of our stories isn't word for word, something that someone said at a meeting. It would be impossible.

Q. "Who at the meeting said 'public officials would profit from this deal'?

A. "Mr. Crow said things to that effect, if not that particular statement. I can't remember whether or not he made that particular statement or not.

"...He certainly made statements that were -- you know, that he, -- I believe I do remember, and of course it has been a long time ago, but I believe I remember him saying that somebody on the County Commission would profit.

Q. "No, but when he makes critical statements such as you have described, or potentially sensitive statements, you want to write those down, wouldn't you?

A. "As much of them as I could.

And, I can -- you know, a lot of times when I cover something like that, I can only write down a few words or a few portions of that statement."

Q. "Well, you didn't just report on the public meeting. You reported on what Mr. Wiley and Mr. Haas told you. They weren't at the meeting, were they?"

A. "No, but I reported on their reaction on what was said about them at a public meeting."

Q. "You knew before this story that Mr. Payne had told your station that Dan Wiley didn't own any interest in his corporation; you knew that, didn't you?"

A. "I knew that, yes."

The question becomes whether or not the constitutional protection is forfeited by the falsity of the statements and the defamation of the Defendant, New York Times, supra 11 L. Ed. 2d at 701.

An investigation had been conducted by Barbara Shaw and Mark King which included contacting the parties and speaking with their attorneys, (T-576-577), and an on-site investigation of the meeting and subsequent phone calls.

### CONCLUSION

There is a great deal of evidence to the effect that the actual statements made by WKRK are substantially different in their scope and character from the statements made, if any, at the meeting; and that the person or persons making any statements, whether similar or not to the statements broadcast, were persons of a different character and number than those indicated on the broadcast as compared to those which actually existed. There is evidence to show that the Defendant staged the broadcast in whole or in part. There is evidence to show that WKRK-TV, Inc. had reason to entertain serious doubts as to the truth of the broadcast due to the source of the libel, the lack of internal consistency in the broadcast and due to the prior investigations of reporters and due to the internal regulations in force by the station at the time. These facts were not made known to the public during the broadcast. In view of the facts supporting these serious doubts, the Defendant's motion for summary judgment was properly denied.

CERTIFICATE OF SERVICE

I, Gregory M. Friedlander, attorney for Appellee in the above entitled case, hereby certify that I have served a copy of the foregoing Brief upon counsel for the Appellant by deposition a copy of same in the United States Mail, postage prepaid and addressed to:

Vincent F. Kilborn, III  
Kilborn & Glibney  
Post Office Box 1904  
Mobile, Alabama 36633

Adrienne S. Wieand  
Baker & Hosteler  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036

on this the \_\_\_\_\_ day of  
19\_\_\_\_.

\_\_\_\_\_  
GREGORY M. FRIEDLANDER  
Attorney for Appellee

